

Matter of Cosme v City of New York
2020 NY Slip Op 31904(U)
June 16, 2020
Supreme Court, New York County
Docket Number: 158919/2019
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 6

Justice

**In the Matter of the Application of
*MICHAEL A. COSME,***

INDEX NO. 158919/2019
MOTION DATE
MOTION SEQ. NO. **1**
MOTION CAL. NO.

Petitioner,

For Leave to Serve and File Late Notice of Claim against

- v -

THE CITY OF NEW YORK,

Respondent.

The following papers, numbered 1 to ____ were read on this motion for/to

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answer — Affidavits — Exhibits _____

Replying Affidavits

PAPERS NUMBERED

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Cross-Motion: Yes X No

Petitioner Michael A. Cosme (“Petitioner”) brings this action, pursuant to General Municipal Law § 50-e(5) for an Order granting leave to serve a Late Notice of Claim, *nunc pro tune*, against Respondent The City of New York (“Respondent”). The Notice of Claim seeks to recover for the serious injuries sustained in a motor vehicle accident on April 10, 2019 in front of the premise at 12 South West Lee Boulevard, in the City of Lawton, State of Oklahoma (the “Accident”). Respondent opposes.

Background/Factual Allegations

Petitioner alleges that on or about April 10, 2019, at approximately 4:00 a.m., in front of the premise at 12 South West Lee Boulevard, in the City of Lawton, State of Oklahoma, Petitioner, an on-duty Detective employed by the New York City Police Department (the “NYPD”), was a passenger in a rental motor vehicle, operated by Detective Michael Riso (“Detective Riso”). Petitioner alleges that the vehicle was involved in an accident. The Official Oklahoma Accident Report and the Police Line of Duty Injury Report state, in relevant part:

DET. COSME AND DET. RISO BOTH OUT OF STATE REGARDS TO A AUTHORIZED TRIP FOR ACTIVE INVESTIONATION (12014038522 / Docket #01411-2019). Det COSME WHO WAS FRONT PASSENGER IN A RENTAL VEHICLE WHICH WAS INVOLVED IN A ACCIDENT CAUSING DAMAGE TO FRONT WINDSHIELD, RIMS, TIRES AND AIRBAGS TO DEPLOY INSIDE THE VEHICLE. DET. COSME SUSTAINED INJURIES AND SEVERE PAIN TO RIGHT SHOULDER / RIGHT HAND AND RINGING IN BOTH EARS. NO BODY CAMERA ON U MOS.

01 WAS TRAVELING EAST BOUND ON SW LEE BLVD APPROACHING SE RAILROAD STREET WHEN IT DEPARTED THE ROADWAY TO THE RIGHT. TNE DRIVER OF UNIT 01 SAID THAT HE WAS CHECKING THE GPS TO MAKE SURE HE WAS GOING IN THE RIGHT DIRECTION AND MADE CONTACT WITH THE SW LEE BLVD SOUTH CURBLINE. THE DRIVER OF UNIT 01 SAID THAT AFTER HE MADE CONTACT WITH THE CURB ALL 4 TIRES WERE BLOWN OUT AND THE AIR BAGS WERE DEPLOYED. THERE WERE NO INJURIES REPORTED AT THE TIME OF THE COLLISION. THE POI WAS APPROXIMATELY 153 FEET WEST OF THE RAILROAD ST WEST CURBLINE AND APPROXIMATELY 127 FEET SOUTH OF THE SW LEE BLVD SOUTH CURBLINE, THE VEHICLE REMAINED ON SCENE WAITING FOR THE WRECKER CALLED BY ENTERPRISE. (Verified Petition, Exhibit C).

Petitioner contends that he suffered severe personal injuries including, “[i]njury and trauma to right shoulder, right hand, head, ears, concussion ringing in ears, damage to labrum and rotator cuff, right shoulder, continuing pain, suffering and disability, loss of overtime earnings, bodily injuries, the nature and extent of which are not presently known.” (Verified Petition, Exhibit A). Petitioner contends that the vehicle

was negligently operated and Respondent was negligent in the ownership, maintenance, and repair of the rental vehicle.

Parties' Contentions

According to the Notice of Claim, the date of the incident is April 10, 2019. Therefore, the deadline to file the Notice of Claim was July 9, 2019. Petitioner filed a proposed Notice of Claim on September 13, 2019 and therefore failed to serve a Notice of Claim within the requisite 90-day period. Petitioner brought the pending motion for leave to serve a late Notice of claim on September 13, 2019. That date is within one year and 90 days of the date the claim allegedly accrued and therefore within the applicable statute of limitations. *See* Public Authorities Law § 1276.

Petitioner argues that the Line of Duty Injury Report, Official Oklahoma Traffic Collision Report, and Witness Statements afforded Respondents with “actual knowledge” of all of the “essential facts” of Petitioner’s claim within 90 days of the Accident on April 10, 2019. Petitioner asserts that the NYPD thoroughly investigated the Accident on the day that it occurred, and therefore Respondent would not be prejudiced in its ability to investigate and defend the merits of Petitioner’s claim. Petitioner contends that the reports set forth the date, time and place of the accident, and Petitioner’s injuries. Petitioner asserts that he was examined by police surgeons for his injuries within the 90 days, to determine whether Petitioner should be permitted to remain out of work or to return to work in a limited or restricted capacity and to determine the nature and extent of the medical treatment Petitioner should receive.

Moreover, Petitioner asserts that “any possible prejudice to the City would be obviated by the fact that this accident involved injuries to a City employee and was witnessed by a City employee, all of whom are still available to be interviewed or deposed.” (Petitioner’s Affirmation at 3). Petitioner argues that “[t]o overcome Petitioner’s *prima facie* showing of lack of prejudice, [Respondent] must produce an affidavit from someone with personal knowledge of the facts which specifies exactly how [Respondent] was prevented from investigating the merits of the claim because of the delay in serving the notice of claim; an affirmation from counsel complaining of the delay in serving the notice of claim is simply not sufficient.” (Petitioner’s Affirmation at 13). Petitioner further argues that because Respondent had actual knowledge of the essential facts of the claim and would not be prejudiced if the Court grants the Petition, “Petitioner need not advance any excuse for the 58 day delay in serving the instant notice of claim.” (Petitioner’s Affirmation at 3-4).

In opposition, Respondent argues that Petitioner's application for leave to serve a Late Notice of Claim should be denied. Respondent asserts that Petitioner failed to show that Respondent had actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter. Respondent asserts that the Police Line of Duty Injury Report and Witness statement do not provide actual knowledge. Respondents argue that the Official Oklahoma Accident Report lists the reporting agency as Lawton Police Department. Respondent further argues that Petitioner has the burden of demonstrating that Respondent had actual knowledge; here, Petitioner failed to demonstrate that Respondent was in possession of the Official Oklahoma Accident Report prior to the filing of the Petition. Respondent asserts that the Line of Duty Report and Witness statement does not show how Petitioner's injuries were connected to Respondent's alleged negligence and therefore, cannot establish that Respondent had actual knowledge. Respondent argues that the Oklahoma Report states that Detective Riso was the passenger and Petitioner was the driver of the vehicle in the Accident. Thus, Respondents assert that "the Oklahoma Report cannot possibly put the City on notice of Detective Riso's alleged negligent operation of the vehicle." (Respondent's Affirmation in Opposition at 7). Respondent argues that the involvement of a municipal employee, acting within the scope of employment, and medical treatment records do not provide actual knowledge. Respondent contends that "medical records 'which provide no indication of a causal connection between plaintiff's injuries and acts of negligence on defendant's part' do not provide actual knowledge." (Respondent's Affirmation in Opposition at 9).

Respondent argues that Petitioner has failed to demonstrate that Respondent would not be prejudiced if his Petition is granted. Respondent contends that Lawton, Oklahoma, the location of the Accident, is about 1500 miles away from New York City, and therefore Respondent cannot "reconstruct the accident." Respondent argues that "Petitioner provides no photos of the vehicle or the accident scene which would allow [Respondent] to reconstruct the accident" and the location could have changed since the date of the Accident. (Respondent's Affirmation in Opposition at 13). Respondent further argues that the car involved in the Accident was a rented vehicle but Petitioner alleges that Respondent "was negligent in its 'ownership, operation, supervision, maintenance, control and repair' of the vehicle." (Respondent's Affirmation in Opposition at 14). Respondent contends that the Oklahoma Collision Report stated that the driver of the vehicle was looking at the GPS at the time of the Accident. Respondent asserts that if it had received actual notice of Petitioner's claim, Respondent would have been able to determine if there were any mechanical issues with the vehicle and would have been able to investigate

whether there was something wrong with the GPS. Additionally, Respondent argues that Petitioner did not provide an excuse for failing to timely file the Notice of Claim.

Legal Standard

General Municipal Law § 50-e(1)(a) states that notice of a claim against a municipality must be served within ninety days after the claim arises. The purpose of these notice of claim requirements are to protect the municipality and governmental entities from “unfounded claims and to ensure that [they have] an adequate opportunity to timely explore the merits of a claim while the facts are still ‘fresh.’ ” *Matter of Nieves v New York Health & Hosps. Corp.*, 34 A.D. 3d 336, 337 [1st Dept 2006].

Section 50-2(5) of the General Municipal Law provides that a court may, in its discretion, grant or deny an application made to file a late notice of claim based on the consideration of a number of factors. The key factors considered are “(1) whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, (2) whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and (3) whether the delay would substantially prejudice the municipality in its defense.” N.Y. Gen. Mun. Law § 50 (McKinney). In addition, “the presence or absence of any one factor is not determinative.” *See also Velazquez v. City of New York Health and Hosps. Corp. (Jacobi Med. Ctr.)*, 69 A.D. 3d 441, 442 [1st Dept 2010]. “The failure to set forth a reasonable excuse is not, by itself, fatal to the application.” *Id.* at 442.

“The petitioners ignorance of the requirement that a notice of claim pursuant to General Municipal Law § 50-e must be served within 90 days after accrual of the claim is not a legally acceptable excuse.” *Ragin v. City of New York*, 222 A.D.2d 678 [1995].

“The most important factor ‘based on its placement in the statute and its relation to other relevant factors is whether the public corporation acquired actual notice of the essential facts constituting the claim within 90 days of the accrual of the claim or within a reasonable time thereafter.’ ” *D’Agostino v. City of New York*, 146 A.D.3d 880, 880, [2d Dept 2017]. The Petitioner must demonstrate that the municipality acquired actual knowledge. *Bass v. New York City Transit Auth.*, 45 Misc. 3d 1222(A) [N.Y. Sup. Ct. 2014], *aff d*, 140 A.D.3d 449 [1st Dept 2016].

“The direct involvement of the respondent’s employee in the accident itself, without more, is also not sufficient to establish that the respondents acquired actual notice of the essential facts constituting the claim.” *D’Agostino*, 146 A.D.3d at 881. Where “the municipality’s employee was involved in the accident and the report or investigation reflects that the municipality had knowledge that it committed a potentially actionable wrong, the municipality can be found to have notice.” *Jaffier v. City of New York*, 148 A.D.3d 1021,1023 [2d Dept 2017]. “In order to have actual knowledge of the essential facts constituting the claim, the public corporation must have knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim; the public corporation need not have specific notice of the theory or theories themselves.” *D’Agostino*, 146 A.D.3d at 880-81.

A plaintiff must show that the delay would not substantially prejudice the defendant so that failure to serve a timely notice of claim does not deprive “defendant of the opportunity to conduct a prompt investigation of the merits of the allegations against it that the notice provision of General Municipal Law § 50-e was designed to afford.” *Bass v. New York City Transit Auth.*, 45 Misc. 3d 1222(A) [N.Y. Sup. Ct. 2014], *affd*, 140 A.D.3d 449 [1st Dept 2016]. “Such a showing need not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice.” *Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 466 [2016], *reargument denied*, 29 N.Y.3d 963 [2017]. “The mere passage of time is not alone a sufficient basis to deny leave to file a late notice of claim. (*Trejo v. City of New York*, 156 A.D.2d 164, 548 N.Y.S.2d 208 [notice filed 13 years after injury]).” *Holmes by Holloway v. City of New York*, 189 A.D.2d 676, 677-78 [1993].

Discussion

Petitioner does not provide a reasonable excuse for the failure to serve the Notice of Claim within 90-days. However, “[t]he failure to set forth a reasonable excuse is not, by itself, fatal to the application.” *Velazquez*, 69 A.D. 3d at 442.

Moreover, Petitioner has not demonstrated that Respondent “acquired actual knowledge of the essential facts constituting petitioner’s claim, based on the reports.” *Bass v. New York City Transit Auth.*, 45 Misc. 3d 1222(A) [N.Y. Sup. Ct. 2014], *affd*, 140 A.D.3d 449 [N.Y. App. Div. 2016]. The Official Oklahoma Accident Report, the Police Line of Duty Injury Report, and Witness statement do not provide actual knowledge. The Official Oklahoma Accident Report lists the reporting agency as Lawton Police Department. The Official Oklahoma Accident

Report, the Police Line of Duty Injury Report, and Witness statements do not put Respondent on notice for Petitioner's claim of, "[n]egligence, carelessness and recklessness in the ownership, operation, supervision, maintenance, control and repair of motor vehicle; failure to warn; claim pursuant to Section 11-106 of the General Obligations Law; claim pursuant to Section 205-e of the General Municipal Law for violation of, inter alia, Sections 1212, 1180(a), 375(1) of the Vehicle and Traffic Law; in failing to keep a proper lookout and to avoid the happening of the occurrence complained of." (Verified Petition, Exhibit A). "The direct involvement of the respondent's employee in the accident itself, without more, is also not sufficient to establish that the respondents acquired actual notice of the essential facts constituting the claim." *D'Agostino*, 146 A.D.3d at 881. Consequently, Respondents does not have knowledge of a potentially actionable wrong, constituting actual notice. *See Jaffier v. City of New York*, 148 A.D.3d 1021, 1023 [2d Dept 2017].

Furthermore, Petitioner has not demonstrated that his "failure to serve a timely notice of claim" does not deprive "defendant of the opportunity to conduct a prompt investigation of the merits of the allegations against it that the notice provision of General Municipal Law § 50-e was designed to afford." *Velazquez*, 69 A.D. 3d at 442. "Such a showing need not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice." *Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 466 [2016], *reargument denied*, 29 N.Y.3d 963 [2017]. Because the location of the Accident is about 1500 miles away from New York City and the car involved in the alleged Accident was a rental car, Respondent did not have the opportunity to conduct a "prompt investigation." *Velazquez*, 69 A.D. 3d at 442. Thus, Respondent will suffer substantial prejudice from the late Notice of Claim. Therefore, the Petition should be denied.

Wherefore it is hereby

ORDERED that the motion to deem the Notice of Claim served upon Respondent as timely filed *nunc pro tunc* is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: June 16, 2020

ENTER: 
_____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**